Supreme

[redacted]

vs.

MARTIN A. JANIS, DIRECTOR OF THE [redacted] PARTMENT OF MENTAL HYGIENE [redacted] RECTION,

[redacted]

ON WRIT OF CERTIORARI TO THE [redacted] COURT OF THE STATE OF [redacted]

BRIEF FOR THE RESPONDENT.

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ERRATA SHEET

JAMES BROOKHART V. JANIS
NO. 657

Certain errors in citations appear in the index to Respondent's brief. The correct citations are as follows:

Arnold v. United States, (9th Cir. 1964) 336 F. 2d 347 . . . . . .
Brown v. Mississippi, 297 U.S. 278 . . . . .
Cohen v. Hurley, 366 U.S. 117 . . . . . .
Lutwak v. United States, 344 U.S. 604 . . .
Delete McFadden v. United States
Add Paschal v. United States, (5th Cir. 1962) 306 F. 2d 398 . . . . . .
Delete Post v. Cunningham
Add Root v. Cunningham, (4th Cir. 1965) 344 F. 2d 1 . . . . . .
United States v. Denny, (7th Cir. 1947) 165 F. 2d 668 . . . . . .
Delete United States v. Haskins
Add United States v. Crowder, (6th Cir. 1965) 346 F. 2d 1 . . . . . .
Delete Article I, Section 19, Constitution of Ohio (1851)

The following errors appear in the body of the brief:

At page 34 note 29 should read:
As defined above, see notes 7, 8 and 9. .
At page 55, line 9, the citation Rogers v. United States should read Paschal v. United States, (5th Cir. 1962) 306 F. 2d 398. . .
At page 55, line 16, the citation McFadden v. United States should read Rogers v. United States, (5th Cir. 1962) 304 F. 2d 520. . . . . .

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Subject Index

CITATIONS

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United States Supreme Court Rules:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 657

JAMES BROOKHART,

Petitioner,

vs.

MARTIN A. JANIS, DIRECTOR OF THE OHIO DEPARTMENT OF MENTAL HYGIENE AND CORRECTION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO
BRIEF FOR THE RESPONDENT

Opinion Below

The opinion of the Supreme Court of the State of Ohio (R. 78-88) is reported at 2 Ohio St. 2d 36, 205 N.E. 2d 911 (1965).

Questions Presented

I.

Does the trial court by allowing the State to amend certain counts of an indictment for forgery and uttering and publishing forged checks by making changes, in the numbers of three checks, the amounts on two of them and the

name of the payee on one, constitute such an amendment as would change the nature, name, or identity of the offense charged and thereby cause a defendant to be tried on an indictment not returned by the grand jury; and did the Supreme Court of Ohio err in finding that such amendments were those of form only and were allowable under Ohio law?

II.

Does a defendant in a criminal prosecution waive his right to cross-examine witnesses against him when his counsel, in defendant's presence, waives such right and where, under the circumstances, such waiver was not arbitrary or fatuous and where the defendant, at no time, in any manner, specifically objects to such waiver and who makes no such general objection to his counsel's acts as would be tantamount to a request for his dismissal?

III.

Does a defendant in a criminal prosecution have a constitutional right to confront a witness against him, where the testimony of the witness is under oath, the right to cross-examine the witness has been waived, the authenticity of the statement is not challenged and the testimony amounts to a statement against interest?

IV.

Did the Supreme Court of Ohio err in finding that the trial judge had conducted a fair, impartial, and unprejudiced trial when, based upon a record of the trial which disclosed that after a plea of not guilty, a pretrial colloquy was held between the trial court, counsel and Petitioner during which the court likened a *prima facie* case, which had been proposed by defense counsel, to one in which

"the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it" and further that under such procedure the prosecution would only have to introduce sufficient proof to establish the guilt of the Petitioner and that cross-examinaton of State witnesses would not be permitted; after which Petitioner interjected that "in no way am I pleading guilty" and the court then offered to allow him to withdraw his waiver of jury trial and have a jury trial, which offer was rejected by Petitioner who then said, "I would like to be tried by this Court"; after which the court then told Petitioner he would have to decide if he wanted a *prima facie* case or a full trial and defense counsel replied, "Prima facie, Your Honor, is all we are interested in."†

STATEMENT

In an eight-count indictment filed in the Court of Common Pleas of Stark County, Ohio, on March 3, 1961, Doris Mae Jones, Ronald K. Mitchell, and Petitioner were charged with four counts of forgery[1] and four counts of uttering forged instruments[2] (R. 5-9). In a second indictment filed on the same day, Petitioner and Ronald K. Mitchell were charged with breaking and entering[3] and grand larceny[4] (R. 10-11). When arraigned on January 29, 1962, Petitioner entered pleas of not guilty to all charges. Two days later, counsel was appointed to represent Petitioner (R. 12-13).

On March 23, 1962, after Petitioner's co-defendants had been convicted, the indictments in which Petitioner was named were consolidated for trial, written waivers of jury

1. Ohio Revised Code, Section 2913.01 (1953).
2. *Ibid.*
3. Ohio Revised Code, Section 2907.10 (1953).
4. Ohio Revised Code, Section 2907.20 (1953).

trial were entered, and Petitioner was tried by the court (R. 20-21). Petitioner was found guilty on three counts of forgery, three counts of uttering, one count of breaking and entering, and one count of grand larceny. Consecutive sentences of one to twenty years were imposed in each of the forgery counts to run concurrently with sentences on all other counts (R. 13-19). Petitioner did not file a motion for a new trial.

On June 27, 1962, the Petitioner filed a Notice of Appeal and a Motion for Leave to Appeal in the Fifth District Court of Appeals. This motion was overruled and appeal denied December 29, 1962. No appeal was sought in the Ohio Supreme Court.

On October 15, 1964, Petitioner filed a petition for a Writ of Habeas Corpus in the Supreme Court of Ohio (R. 13). He contended only that his confinement was in violation of the Constitutions of the United States and of the State of Ohio. He made no allegations as to the manner in which his rights had been violated. A Return of Writ was filed by the Respondent setting forth the judgment of conviction and sentence upon which Petitioner was being held in the London Correctional Institution (R. 4). On November 24, 1964, a hearing was held by the Master Commissioners of the Supreme Court of Ohio. At the hearing Petitioner contended that, at his trial, he had been denied the right to confront and cross-examine witnesses, that he had been tried upon charges other than those contended in the indictments returned against him, and that he had been denied reasonable notice of the charges ultimately tried. In answer to these allegations Respondent introduced a transcript of the proceedings which had resulted in Petitioner's conviction (R. 72).

The transcript disclosed the following: At the commencement of the proceedings the court inquired of defense counsel if both indictments were to be tried together and having received an affirmative answer then advised Petitioner that he had a right to a jury trial and asked him if he so understood. Petitioner indicated that he did so understand (R. 20). He also indicated that he had signed waivers of jury trial and acknowledged his signature thereon (R. 21).

Then followed a colloquy between the court and counsel in the presence and hearing of the Petitioner (R. 21-22). The significant parts of this conversation disclosed that Petitioner's counsel introduced the fact that the matter was before the court on a *prima facie* case (R. 21). It further disclosed that Petitioner was particularly attentive and aware of the proceedings that were taking place. When, after the court had likened a *prima facie* case to one wherein the Defendant, not technically or legally, in effect admits his guilt, but wants the State to prove it, Petitioner immediately interjected, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). After the court again had offered to give him a jury trial, Petitioner indicated that he "would like to be tried by this court." The court then advised him to make up his mind whether he required a *prima facie* case or a *complete trial* of it. Defense counsel replied, "Prima facie, Your Honor, is all we are interested in" (R. 22). No objection to the procedure was made by Petitioner, who by then knew that this procedure precluded the cross-examination of witnesses. This fact also is borne out by his allegation in his petition in this court "that this [the fact that he was not confronted with his accusers and that his counsel was not allowed to cross-examine witnesses] arose because of his trust in his court appointed attorney * * *".[5]

5. Page 5, Petition for Writ of Certiorari.

At the outset the prosecution waived opening statements. The prosecutor did indicate, however, that "the State of Ohio will prove each and every material allegation necessary in those particular cases [all counts of both indictments] by witnesses", to which the court interposed "*there is no question the court will require that*" (R. 22). (Emphasis supplied.)

During the course of the trial six exhibits were offered in evidence. Exhibits "A", "B", and "C" were checks, "D" was a copy of a check, "E" was a transcribed sworn statement of Ronald Keith Mitchell, a co-defendant who theretofore had pleaded guilty to the charges and who, at the time, was incarcerated in the Ohio State Reformatory and who was not presented as a witness (R. 52) and "F" was a letter written by the Petitioner to the Stark County Prosecuting Attorney and a reply thereto (R. 49). Exhibits "D" and "F" were not admitted in evidence (R. 53 - R. 50). All others were admitted over defense's objection (R. 53-R. 39).

During the progress of the trial the prosecution was allowed to amend the indictments in six counts to conform to the proof. The first and second counts were amended by substituting the check number 361 for 364 and the amount of the check $57.58 for $57.82 (R. 24). The third and fourth counts were amended by substituting the check number 367 for 364 (R. 26). The fifth and sixth counts were amended by substituting the check number 374 for 364 and the amount of the check from $57.82 to $72.63 (R. 26) and later to substitute the name of the payee, James Brookhart for Jimmy Cox (R. 52).

Defense counsel objected to the admission of Exhibit "E" for the reason that the party, a co-conspirator who had given the statement, should be produced. In response to a question of the court, "that you are not denying the state-

ment", counsel answered, "No we are not denying the statement but we are objecting to it at this time" (R. 39). He did not state upon what grounds his objection was predicated.

At the conclusion of the State's case the court dismissed counts seven and eight of the forgery and uttering indictment for failure of proof. It then overruled a defense motion to dismiss all other counts (R. 53), and found Petitioner guilty as charged except as to counts seven and eight on the forgery and uttering indictment, and on both counts of the burglary and larceny indictment (R. 54). In response to a question of the court as to whether he had anything to say why judgment should not be pronounced, Petitioner answered, "Nothing, Your Honor" (R. 54).

The sentences on each count of forgery (1-20 years) was pronounced to run consecutively, the sentences on all other counts to run concurrently therewith (R. 56).

Upon the statements made by the Petitioner at a hearing and the record of proceedings in the trial court, the Master Commissioners recommended that the Writ be denied (R. 74-R. 76). On March 31, 1965, the Supreme Court of Ohio denied the Writ; two judges dissented.[6] It is from the Ohio Supreme Court's order remanding Petitioner to custody that the petition herein was sought and was granted.

Summary of Argument

I.

Petitioner was denied no fundamental right—the right to reasonable notice of the charges upon which he was tried. The indictment for forgery and uttering and publishing forged checks contained each and every element of the offenses charged with such definiteness as to enable him to

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6. *Brookhart v. Haskins*, Superintendent, 2 Ohio St. 2d 36 (R. 77—R. 88).

present a defense thereto and to preclude a further prosecution for the same offense. The variations between the counts in the indictment and the checks introduced to support them were minor in nature, in fact, were not made in any essential parts of the checks described.

They were not such variations that would effect the substantial rights of Petitioner within the provisions of Rule 52 (a) Federal Rules of Criminal Procedure. Cf. *Berger v. United States*, 295 U.S. 78, 82; *Bennett v. United States*, 227 U.S. 333,338; *Arnold v. United States*, (9th. Cir. 1964) 336 F. 2d 1. Nor were they such that they could not be amended as matters of form under the provisions of Section 2941.30, Ohio Revised Code. Cf. *Dye v. Sacks, Warden*, 173 Ohio St. 422, 183 N.E. 2d 380.

Federal courts consistently have allowed amendments in indictments going only to the matter of form. Cf. *Dye v. Sacks, Warden*, (6th. Cir. 1960) 279 F. 2d 834; *Russell v. United States*, 369 U.S. 749, 770; *Del Piano v. United States*, (E.D.PA 1965) 240 F. Supp. 687; *United States v. Fawcett*, (3rd. Cir. 1940) 115 F. 2d 764, 767; *United States v. Denny*, (7th. Cir. 1947) 165 F. 2d 668, certiorari denied, 333 U.S. 844; *Williams v. United States*, (5th. Cir. 1950) 179 F. 2d 656, 659, *affirmed* 341 U.S. 97.

II.

Petitioner, by counsel, waived the right to cross-examine witnesses against him and notified the court and prosecution before trial that he would put on no evidence in his own defense. Counsel is in charge of the law suit and his decisions as to defense strategy and trial tactics are binding on his client. *Henry* v. *Mississippi*, 379 U.S. 443; *United States ex rel. Machado* v. *Wilkins* (2nd Cir. 1965) 351 F 2d 892. The state has a substantial interest in binding a defendant to his counsel's chosen strategy. *United States ex*

rel. Reid v. *Richmond*, (2nd Cir. 1961) 295 F. 2d 83. Defense strategy includes the question of whether or not to cross-examine witnesses or to demand to confront them. See, e.g., *Cruzado* v. *Puerto Rico*, (1st Cir. 1954) 210 F. 2d 789.

These decisions are binding on the defendant unless counsel's actions are arbitrary (manifesting "ineffective" counsel as defined by this court) or fatuous (manifesting incompetent counsel as defined by federal courts) or are specifically objected to by defendant (*Glasser v. United States*, 315 U.S. 60) or such general objection as to be tantamount to a request for a dismissal of counsel.

The record does not support the finding of any of these infirmities and the trial court therefore had a right to rely upon his judgment. Counsel's decision was deliberate, clear and under the circumstances of overwhelming evidence and no defense not an unwise choice even in hindsight. Nor is the statement that he was in no way pleading guilty inconsistent with his counsel's pretrial waiver of cross-examination and revelation that there would be no defense. It certainly could not be stretched to a specific rejection of this strategy. There is no intimation anywhere in the record that Petitioner was in any way dissatisfied with his counsel or wanted him dismissed.

III.

The introduction of the out of court sworn testimony of the alleged co-conspirator over defense counsel's objection was not constitutional error. Defense counsel had waived the right to cross-examine the witness even had he been called to confront the accused. Furthermore, the statement was made under oath. Since the fundamental fair trial guarantee in the right to confrontation is the right to cross-examine (*Pointer v. Texas*, 380 U.S. 400), the effective waiver of such right as a matter of trial tactics, removes

the constitutional infirmity of the admission of the statement.

Moreover, since it could arguably have been introduced in a civil suit as a statement against interest, exception to the hearsay rule, such introduction even without waiver or swearing would not have been fundamentally unfair. Cf. *United States v. Leathers*, (2nd Cir. 1943) 135 F. 2d 507, 511. The statement had something other than cross-examination and swearing to guarantee its truth. Cf. *Mattox v. United States*, 156 U.S. 237.

In keeping with the recognition by this court of the evolutionary development of due process (implicit in *Linkletter v. Walker*, 381 U.S. 618), if *Pointer v. Texas, supra*, is to be applied retrospectively to this case, only its strict "fundamental fairness" aspect (see concurring opinion of Harlan J., in *Pointer v. Texas*) should be applied. A strict "per se" sort of application of this sixth amendment right to the states would only undermine the confidence state courts place in the pronouncements of this court. Whatever the virtue of *Stein v. New York*, 346 U.S. 156, on close analyses, it certainly contained language that could have led a court at the time of the trial in this case, to believe that the sixth amendment right to confrontation did not inflexibly apply to the states.

IV.

Petitioner was denied no fair trial because of any prejudice on the part of the trial judge.

Although the question of judicial prejudice never was raised in the court below or in the petition for a writ of certiorari filed herein, Respondent submits that under the factual situation of this case the question of judicial prejudice just is not supportable.

Petitioner, one of three co-defendants, two of whom there-

tofore had pleaded guilty to the same indictments, was, on a plea of not guilty, provided with a court appointed counsel. After consultation with his counsel it was agreed as a part of the trial strategy that the case would be submitted at a trial before the court, wherein only a *prima facie* case would be required to be proved by the State. Prior to trial a colloquy in the nature of a pretrial hearing was held by the court and counsel in the presence of Petitioner. At this time the court was informed by Petitioner's counsel that the case was being submitted on a *prima facie* basis (E. 21). The court then defined his conception of a *prima facie* case as one wherein the defendant, not technically or legally, in effect admits his guilt and precludes cross-examination of State witnesses (R. 21). After this explanation Petitioner interjected, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). The court then, in all fairness informed Petitioner that if he so desired he could have a jury trial even though he had waived one (R. 22). Fully realizing the court's conception of the meaning of a *prima facie* case and any implication the court attached to it, Petitioner then insisted that he desired to be tried by *this court* (R. 22). Even then the court offered to allow either a *prima facie* case or a full trial. Defense counsel indicated that a *prima facie* case was all *we are interested in* (R. 22). It is submitted that at that point Petitioner knew that he could have had the choice of a jury trial, a full trial by the court, or a *prima facie* trial by the court. He also knew that if he had a *prima facie* trial by the court, what the rules of such a trial would be. He further knew that if any prejudice had developed in the mind of the court, certainly it had developed at that time. He knew how the judge regarded a *prima facie* case, having taken part in the discussion with respect to it. In spite of this he insisted in being tried *by this Court.*

He hardly now can complain that the trial judge was pre
udiced. And an examination of the trial itself fails to ev
dence such a prejudice.

The trial court made no improper inference of guilt und
the law as it obtained at the time of the trial. Under t
decision of this Court in *Twining v. New Jersey*, 211 U.
78, the trial judge has been authorized to draw an adver
inference from a defendant's failure to testify. He also w
authorized to do so under Article I, Section 10 of the Co
stitution of Ohio. This conviction took place on March 2
1962 and *Griffin v. California*, 380 U.S. 609, holding th
adverse comment by a trial judge upon a defendant's fa
ure to testify, violated the federal privilege against sel
incrimination, was not decided until April 28, 1965. *Teh*
v. United States ex rel. Shott, No. 52 U.S., January 1
1966, held *Griffin v. California, supra*, not to be retr
active in effect.

The trial judge violated no constitutional right of Pe
tioner during the sentencing phase of the case. After co
viction and before sentence, an explanation by way
mitigation was made by defense counsel to the effect th
at the time the offenses were committed Petitioner w
under the influence of alcohol and benzedrine and had
recollection of the events surrounding him. The court ind
cated that in proceeding as he did on his not guilty pl
and being tried on a *prima facie* case, Petitioner was takin
a flier and had never expected to be acquitted. There
nothing in the record to show that the court was hostile
its attitude toward Petitioner nor that it condemned hi
for pleading not guilty. Further, there is nothing in t
record to support an inference that the court allowed t
not guilty plea to influence the sentence. The fact is th
the court imposed a much lighter sentence than was po
sible under the law.

ARGUMENT

THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT THE PETITIONER HAD NOT CARRIED HIS BURDEN OF SHOWING THAT HIS CONVICTION AND SENTENCE TO THE OHIO PENITENTIARY WERE INVALID FOR VIOLATION OF DUE PROCESS OF LAW FOR WANT OF PROPER NOTICE AND A FAIR HEARING.

Before sentence in the original trial the following colloquy took place:

> "The Court: Defendant come forward.
> Now, Mr. Brookhart, you have just heard the finding and decision of the court in finding you guilty on these charges the court has mentioned. *Now, do you have anything to say why judgment should not be pronounced against you?* A. *Nothing your Honor.* (R. 54) (Emphasis added.)

Then Petitioner did not protest that he had not been sufficiently informed of the charges against him to prepare his defense or that had he known of the variances from the indictment he could have better defended himself.

Then Petitioner did not protest the fact that his counsel had not cross-examined the six accusers who confronted him.

Then Petitioner did not protest that a seventh accuser had not confronted him—a man who, incidentally to accusing himself of the same crimes, accused petitioner.

Then Petitioner did not suggest that had his counsel cross-examined his seven accusers new information would have been disclosed or their testimony impeached.

Then Petitioner did not suggest that there was exculpating evidence that he would like to have presented to the court.

Then the Petitioner did not complain that the court had not been impartial.

Then Petitioner made no complaint about his counsel o
counsel's conduct of his defense.
Then Petitioner did not proclaim that he was innocen
(nor has he ever so proclaimed) or complained that th
abbreviated procedure his counsel had agreed to was i
any way unfair.

Respondent does not now contend that from this on
particular incident at the close of the trial, one could sa
absolutely that the Petitioner had a fair trial, or from an
other particular incident. Respondent does contend, how
ever, that the fairness of this trial must be judged by view
ing the entire record and the facts and circumstances tha
surrounded it. See *Frank v. Magnum*, 237 U.S. 309 (dis
senting opinion by Holmes, J.)

There is little question that the most fundamental as
surance of a fair trial is that the defendant be represente
by counsel. *Powell v. Alabama*, 287 U.S. 45, 68-69. Counse
was appointed to represent defendant in this case. Petition
er's counsel do not contend that Petitioner's trial counse
was ineffective; and for good reason. There are apparentl
no facts to indicate either a conflict of interest [7] or lack o
time for preparation [8] or a want of zealousness [9] on the par
of Petitioner's court appointed counsel. Without evidenc
(or even allegations) to the contrary it must be assume
that counsel took reasonable pretrial steps to ascertain th
facts and explain the law to Petitioner.[10] It can be assume

7. Either in the sense of *Glasser v. United States*, 315 U.S. 60 o
Powell v. Alabama, 287 U.S. 45.

8. Counsel was appointed February 1, 1962 (R. 12 & 13) and tri
began March 23, 1962. (R. 20) *Powell v. Alabama, supra*, and *Haw
v. Olsen*, 326 U.S. 271.

9. Petition for Writ of Certiorari p. 7. See *Post v. Cunningham*, 34
F 2d 1 (4th cir. 1965).

10. See *Michel v. Louisiana*, 350 U.S. 91, 101 (Stating that there is
presumption of the effectiveness of counsel, which respondent contend
certainly would include necessary pretrial preparation.) See also *Bru
baker v. Dickinson*, 310 F. 2d 30 (9th cir. 1962).

that counsel knew that Petitioner's alleged co-conspirators named in his indictment had pleaded guilty (R. 31) or confessed (R. 59) and would be available to testify against him. He knew that Petitioner would not take the stand in his own defense, because Petitioner had apparently told his attorney that he couldn't remember a thing that had happened. (R. 55) He knew that there were no witnesses in his client's defense.[11]

With the above in mind, the Supreme Court of Ohio found that the Petitioner had not been shown fundamental unfairness. The expeditious procedure adopted by opposing counsel here and concurred in by the court would, no doubt, in certain circumstances be fundamentally unfair. If court appointed counsel had had no time to prepare his defense, had had conflicting interests, or had appeared listless in his efforts to defend; or had the evidence produced at trial not appeared so overwhelming and unimpeachable, then the procedure adopted here could raise serious constitutional questions.[12] But that is not the situation in this case and it goes without saying that in due process determinations of the fairness of a hearing, each case must be decided on its own facts and circumstances, (See *Crooker v. California*, 357 U.S. 433, 441, note 6[13]; *Lisemba v. Cali-*

11. Besides the fact that petitioner alleged he could remember nothing, it is clear that the only persons who were with him during the period of the offense were the two accused co-conspirators. There is nothing in the record to indicate that trial counsel was not familiar with the sworn (though uncross-examined) confession by Mitchell. In fact, the nature of the tactic adopted by counsel (admittedly "zealous" in his client's defense at trial) suggests that he was well aware of the overwhelming evidence against his client.

12. See *Glasser v. United States*, *supra*, at 67.

13. Note 6 states *inter alia*: "What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness."

fornia, 314 U.S. 219, 236) and that consistent with our federal system of government, states may adopt procedures fitted to local needs. See *Snyder v. Massachusetts*, 291 U.S. 97, 105.

Respondent proceeds then to answer in particularity petitioner's arguments.

I.

THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT THE ALLOWANCE OF THE AMENDMENTS AS TO MATTERS OF FORM DURING THE TRIAL DID NOT CONSTITUTE A TRIAL UPON CHARGES OTHER THAN THOSE RETURNED AGAINST PETITIONER NOR A DENIAL OF REASONABLE NOTICE OF THE CHARGES ULTIMATELY TRIED; THAT THE AMENDMENTS IN NO WAY CHANGED THE NATURE, NAME, OR IDENTITY OF THE CRIME CHARGED.

In Ohio the Legislature has provided that an indictment is not made invalid, in the trial, judgment, or other proceedings stayed, arrested, or affected:

> "(D) For stating imperfectly the means by which the offense was committed except insofar as means is an element of the offense;
>
> "(E) For want of a statement of the value or price of a matter or thing, or the amount of damages or injury, where the value or price or the amount of damages or injury is not of the essence of the offense, and in such case it is sufficient to aver that the value or price of the property is less than, equals, or exceeds the certain value or price which determines the offense or grade thereof;
>
> "(I) For surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged;
>
> "(J) For want of averment of matter not necessary to be proved;
>
> "(K) For other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits." [14]

The Ohio Legislature also has provided that no indictment shall be quashed, set aside, or dismissed upon the

14. Ohio Revised Code, Section 2941.08 (1953).

basis that an uncertainty exists therein; if the court is of the opinion that any uncertainty exists therein it may order the indictment amended to cure such defect, provided no change is made in the name or identity of the crime.[15]

The Ohio Legislature further has provided that the court may, at any time, before, during, or after trial, amend the indictment in respect to any defect, imperfection, or omission in form, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to cure a variance between the indictment and the proof, the accused is entitled to a reasonable continuance of the cause unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the variance in respect to which the amendment is made.[16]

In Ohio the crimes for forgery and uttering and publishing as pertains to this case are defined as follows:

> "No person, with intent to defraud, shall falsely * * * forge * * * or with like intent, utter or publish as true and genuine such * * * forged * * * matter, knowing it to be * * * forged * * *."[17]

An examination of all counts of the indictment for forgery and uttering and publishing in this cause show conclusively that they meet all the requirements of the statute (R. 5-9). Each count in itself contains all the essential elements to name and identify the crime. It then remains to be determined whether the indictment fairly apprised Petitioner of the offenses that he would be called upon to answer.

Counts one and two were predicated upon a check number 364, drawn upon the State Bank Company, Massillon, Ohio, and called for the payment to the order of Jimmy

15. Ohio Revised Code, Section 2941.28 (1953).
16. Ohio Revised Code, Section 2941.30 (1953).
17. Ohio Revised Code, Section 2913.01 (1953).

Cox, the sum of $57.82. It was signed in the name of R. J. Buchannon as treasurer of Beacon Boxes, Inc. There is no question, therefore, that Petitioner was apprised of the offenses for which he was charged, both as to name and identity. All other checks included, in a similar manner, all of the necessary elements of the offenses charged.

The court allowed the amendment of counts one and two by changing the number of the check from 364 to 361 and the amount from $57.82 to $57.58 (R. 24). The number on the check has no purpose whatsoever except to provide a bookkeeper with an orderly process of keeping accounts. It does not effect the validity of the check in any way. Whatever the amount for which the check was drawn, provided a sum was indicated, it constituted an order for the bank to pay money, and therefore, represented value. Certainly the variance between the indictment and the proof on these counts is so insignificant that it is difficult to conceive how it could prejudice the substantial rights of the Petitioner upon the merits in any way.

An even less significant change was made with respect to counts three and four wherein only the number of the check was changed from 364 to 367 (R. 26).

A somewhat different situation developed with the fifth and sixth counts of the indictment. The court initially allowed an amendment to change the number of the check from 364 to 374 and the amount from $57.82 to $72.63 (R. 26). Defense counsel presented as a further basis for objection the fact that on the indictment served upon the Petitioner the name of the payee on count five and six was blank (R. 33). It also appeared that the name of the payee on the original indictment was Jimmy Cox, but that on the check upon which it was based (Exhibit "C") the name of the payee was James Brookhart (R. 33). When a motion to amend to change the name from Jimmy Cox

to James Brookhart was made the court reserved its ruling in order to check the law on a subject (R. 38). After consultation with counsel in chambers (R. 51), the court allowed the amendment. It did so relying upon the statute allowing an amendment (Section 2941.28, Ohio Revised Code) (R. 52). It is submitted that a change in the name of the payee or the addition of the name of the payee of a check has no bearing on whether or not it is a forgery. The signature of the maker and/or the endorser are the material elements of the crime because it is by virtue of these signatures that payment is made.

Petitioner cannot complain of lack of notice for another reason. If Petitioner's counsel had found the indictment and proof at variance in such manner that he considered the indictment fatal, he should have, in accordance with the provisions of Ohio law,[18] filed a motion to quash the indictment; and if it appeared to him for the first time during the trial he was bound, under this section, to have moved to quash the indictment when it first came to his attention. A careful examination of the record fails to show any motion to quash.

Further if he had found that he was jeopardized in any way in defending the amended indictment he should have moved for a continuance.[19] An examination of the record fails to disclose such a motion.

When Petitioner presented to the Ohio Supreme Court his contention that he was not tried upon the indictment returned by the grand jury but rather one returned by the prosecutor, that court had before it the record of the trial court. The court found with respect to this contention as follows:

"Section 2941.30, Revised Code, provides in part as follows:

18. Ohio Revised Code, Section 2941.29 (1953).
19. Ohio Revised Code, Section 2941.30 (1953).

"'The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.'

"This section permits amendments to an indictment, which do not change the nature or identity of the offense.

"The indictments presently before us were for forgery and uttering a forged instrument. They were complete on their face and properly charged the offense in issue. An amendment to an indictment for forgery or uttering, which merely changes the check numbers, amounts or the names of the payee as set forth in the indictment, is a matter of form, not of substance, and in no way affects the nature or identity of the offense as charged. Thus, such amendments relating to form and not substance are proper. *Dye v. Sacks, Warden,* 173 Ohio St. 422." (R. 78)

This construction of the law by the Ohio Supreme Court is no different with respect to the amendment of an indictment as to matters of form than that enunciated by this Court as follows: "* * * this underlying principle [that an indictment must be returned by a grand jury] is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury unless the change is merely a matter of form". *Russell v. United States,* 369 U.S. 749, 770.

In sustaining an Ohio conviction wherein the indictment charging armed robbery was amended by correcting a misdescription of the victim's name, a federal court held that the amendment related to a matter of form and not of substance and did not change the nature of the offense charged, and such amendment did not invade accused's constitutional rights. *Dye v. Sacks, Warden,* (6th Cir. 1960) 279 F. 2d 834. Certainly the name of a payee, or an amount

on a check alleged to have been forged, is no less a matter of form than is the name of a victim alleged to have been robbed and certainly it is no less a matter of form than substituting the words "Federal Savings and Loan Insurance Corporation" for the words "Federal Deposit Insurance Corporation", the victim in a bank robbery indictment. Del Piano v. United States, (E.D.PA 1965) 240 F. Supp. 687.

One federal test with regard to the amendment of an indictment appears to be:

> "* * * the [federal court] test as to whether a defendant is prejudiced by an amendment to an indictment has been said to be whether a defense under an indictment as it orginally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be applicable in the one form as in the other." *United States v. Fawcett,* (3rd. Cir. 1940) 115 F. 2d 764, 767. See also *United States v. Denny,* (7th Cir. 1947) 165 F. 2d 668, *certiorari denied,* 333 U.S. 844.

Another test has been that,

> "If a defendant is in no sense misled, put to added burdens, or otherwise prejudiced, by an indictment such an amendment [changing the name of the corporation that defendant was alleged to have been working for] ought to be considered and treated as an amendment of form and not of substance, and therefore, allowable, even though unauthorized by the grand jury." *Williams v. United States,* (5th Cir. 1950) 179 F. 2d 656, 659, affirmed 341 U.S. 97.

It further is submitted that the allowance of the amendment by the trial court not only did not prejudice Petitioner in any way, but also need not have been made in order to convict Petitioner of the offenses charged. The variances between the allegations and the proof were not such as would affect the substantial rights of Petitioner.

Federal rules of criminal procedure provide that any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.[20]

Federal courts consistently have interpreted this rule to mean that, where the indictment and proof correspond substantially or where the defendant could not have been misled at the trial or deprived of protection against another prosecution for the same offense, the variance is not material.

This Court has so held in a case wherein the indictment charged Petitioner to have conspired with seven other persons and the proof developed that two different conspiracies, one with two persons and one with three persons actually had taken place. Petitioner was involved in only one. This Court held:

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be able to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger v. United States*, 295 US. 78, 82. See also *Bennett v. United States*, 227 U.S. 333, 338; *Arnold v. United States*, (9th. Cir. 1964) 336 F. 2d 347; *United States v. Haskins*, (6th. Cir. 1965) 346 F. 2d 1; *Brilliant v. United States*, (8th Cir. 1962) 297 F. 2d 385, *certiorari denied*, 369 U.S. 871.

Respondent has no quarrel with the contention that a trial court cannot permit the State to try an accused for offenses other than those with which he was charged in the indictment, but it seriously contends that such permission was not afforded the State in Petitioner's trial.

Respondent also has no quarrel with the decisions cited by Petitioner. In *Cole v. Arkansas*, 333 U.S. 196, the indict-

20. Rule 52 (a), Federal Rules of Criminal Procedure, 28 U.S.C.

ment charged an offense under and in the language of section two of a statute which defendant claimed to be unconstitutional. The Arkansas Supreme Court affirmed the conviction on the basis that the proof was sufficient to allow the court to find defendant guilty under section one of the statute. It failed to consider either the sufficiency of the evidence to sustain the conviction under the alleged section of the statute or the constitutional objections raised by defendants thereto. This Court held that such procedure had the effect of convicting the defendant without a trial.

And *In re Oliver,* 333 U.S. 257, no indictment was returned at all but rather Petitioner was summarily committed for contempt. This Court held that such commitment constiuted a denial of due process in violation of the Fourteenth Amendment because a reasonable opportunity to be heard on the contempt charge had not been afforded Petitioner.

In *Russell v. United States,* 369 U.S. 749, at 755, the indictment was held to be faulty because it did not allege an essential element of the offense, namely that it did not identify the subject matter under inquiry by a congressional committee; that such identification would be essential to the determination as to whether the question which the witness refused to answer was pertinent to the subject then under investigation by the congressional body which summoned defendant.

In *United States v. Cruickshank,* 92 U.S. 542, at 558, an indictment which charged that defendant had conspired to prevent certain citizens in the free exercise and enjoyment of "every, each, all and singular" the rights granted by the Constitution to be invalid for vagueness. This Court held therein at page 558, "a crime is made up of acts and intent; and those must be set forth in the indictment with

reasonable particularity of time, place, and circumstances". (Emphasis supplied.)

And in *De Jonge v. Oregon,* 299 U.S. 353, at 362, this Court held that an indictment for a violation of a criminal syndicalism statute charged no crime at all. And there being no charge there could be no conviction.

In *Stirone v. United States,* 361 U.S. 212, an indictment charging the violation of a federal statute by interfering with interstate movement of commerce which alleged an interference with the movement of sand would not support a conviction for the interference of the movement of steel, an entirely different commodity.

Since the rule of *Ex Parte Bain,* 121 U.S. 1, this Court has repeatedly held, as have all other federal courts, that amendments constituting only a change in form and in going to the substance of the offense charged are permissible without invalidating the indictment returned by the grand jury.

Were the descriptions of the checks radically different from that contained in the indictment as contended in Petitioner's brief,[21] it is possible that the Ohio Supreme Court might have found otherwise than it did, but certainly the amendments made were not radical, in fact, were minor in detail and did not change the identity of the offense nor any of the necessary elements thereof.

Nothing in *United States v. Hess,* 124 U.S. 483, or *United States v. Simmons,* 96 U.S. 360, compels a different conclusion. In *Hess, supra,* the indictment charging fraud failed, for failing to allege the scheme constituting the fraud, and this Court found that such was an essential element of the crime. In *Simmons, supra,* under a statute prohibiting the use of a still where the defendant, himself, was

21. Page 42 of Petitioner's brief.

not charged with using the still but only with causing or procuring someone else to use it, the name of that person was considered to be an essential element of the offense and should have been alleged.

Respondent, in the light of all decisions, cited both by the Petitioner and Respondent again submits that any amendments made in the indictment were as to matters of form only and in no way charged the nature or identity of the offenses charged and, in fact, that the indictments would have supported the convictions thereon under the proof submitted without amendment. Such amendments, in no way, violated any constitutional rights of Petitioner nor rendered the trial unfair.

II.

THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT PETITIONER'S TRIAL WAS NOT UNFAIR FOR HE WAS AFFORDED ALL HIS CONSTITUTIONAL RIGHTS AND WHILE REPRESENTED BY COUNSEL WAIVED SOME OF THESE RIGHTS AND RETAINED OTHERS AND THOSE RIGHTS NOT WAIVED WERE FULLY PROTECTED.

A. Petitioner Waived His Right To Cross-Examine Witnesses Against Him For The Acts Of Counsel For Defendant Made In Defendant's Presence Including The Waiver Of The Right To Cross-Examine Are Presumed To Be The Acts Of The Defendant, Himself, And This Presumption Can Be Rebutted Only By A Showing Either That The Acts Were So Arbitrary And Fatuous As To Manifest A Marked Want Of Concern For His Client's Interest Or That Defendant Made Specific Objection To His Counsel's Act Or Made Such General Objection To The Acts Of His Counsel As To Be Tantamount To A Request For His Dismissal.

1. Defendant's Trial Counsel Effectively Waived Defendant's Right To Cross-Examine For A Defendant Can Waive Any Or All Rights In A Criminal Prosecution And Most Rights, Especially Those Relating To Defense Strategy Or Trial Tactics, Can Be Waived By Defense Counsel.

Petitioner does not deny that the right to cross-examine the witnesses against him can be waived. He alleges, however, that this right must be waived personally by the defendant, himself. Although it is certainly true that certain rights are of this nature, those relating to defense strategy and trial tactics are not.

Henry v. Mississippi, (1965) 379 U.S. 443; *United States ex rel. Machado v. Wilkins,* (2d Cir. 1965) 351 F. 2d 892; *United States ex rel. Reid v. Richmond,* (2d Cir. 1961) 295 F. 2d 83 (sitting with a five judge court), *rehearing denied* October 11, 1961; *certiorari denied,* 368 U.S. 948; *rehearing denied,* 368 U.S. 979; *rehearing denied,* 369 U.S. 881; *Cruzado v. People of Puerto Rico,* (1st Cir. 1954) 210 F. 2d 789, 791,[22] Certainly the decision as to whether to cross-examine any particular witness or none of the witnesses is particularly within the province of defense counsel. See opinion of Magruder, Chief Judge, in *Cruzado v. People of Puerto Rico, supra,* at 791.

The recent case of *United States ex rel. Machado v. Wilkins, supra,* provides a close analogy to the case at bar. There court appointed counsel stipulated that the People's case be submitted on the preliminary transcript (at which defendant appeared without counsel and no witnesses were cross-examined) and "thus consented to its introduction as a matter of trial strategy". (at page 894) The court concluded at 895:

> "In essence the appellant's position is that as a matter of hindsight he disagrees with his counsel's trial strategy and therefore claims that he was not competently represented. Appellant is bound by the strategy which his counsel adopted [citing *Henry v. Mississippi, supra*] unless he was so inadequately represented as to make his trial a mockery of justice. * * *"

True, in the cases cited above, the pretrial waiver of cross-examination was done upon viewing testimony al-

22. See also, *Wilson v. Gray,* (9th Cir. 1965) 345 F. 2d 282 (right of confrontation); *Rhay v. Browder,* (9th Cir. 1965) 342 F. 2d 345 (propriety of instructions); *United States v. Joseph,* (6th Cir. 1964) 333 F. 2d 1012, 1013 (right of confrontation).

ready given and reduced to record. But is that substantially different from the pretrial waiver by a defense counsel appointed substantially ahead of trial who certainly could have known of the quantity and quality of physical and eyewitness evidence against his client, (see note 5, *supra*) and certainly must have known of this given his admitted zealousness at trial (and no allegation of want of such zeal before trial) and the defense strategy adopted. He, in effect, told the court beforehand that my pretrial investigation reveals that we have no defense, no knowledge of impeaching evidence but we will call upon the State to prove their allegations by competent and relevant evidence.[23] We will tell the State beforehand, that it will not need to reconstruct the credibility of witnesses for I know of nothing on which I can construct a cross-examination to destroy their testimony. The State need not, therefore, pile on the evidence. That this was the general nature of counsel's suggestion is borne out by his attempt to preserve the right to cross-examine if anything new came up (R. 21). After the court explained its understanding of a "*prima facie* case", the protest by defendant of the "in effect admits his guilt" aspect of the "ordinary *prima facie* case", and a further brief colloquy, counsel was apparently satisfied that the best strategy was to proceed as originally planned knowing that the court had been informed by the defendant that the "ordinary" "in effect plea of guilty" was repudiated. He was apparently further relying on the original statement of the court that it would not find him guilty "if (sic) [unless] [24] the evidence is substantial".[24a] Counsel, therefore, chose to proceed without cross-

23. In *Powell v. Alabama, supra,* Mr. Justice Sutherland pointed out that one of the chief functions of trial counsel is to make sure that an accused is convicted only on relevant and competent evidence.

24. Respondent does not know whether the word "if" is an error in transcription by the stenographer or was actually said. In either event, it is clear that the court meant "unless the evidence is substantial".

examination. Whatever the wisdom of such a strategy (which as we point out below was considerable under the circumstances) the State has a crucial and legitimate interest in being able to rely on defense counsel's adopted strategy. *United States ex rel. Reid v. Richmond, supra,* at 89, 90. To hold otherwise would be to make questionable every trial where defense counsel has failed to gain an acquittal.

Respondent does not contend that in every case a court may rely on the adopted strategy of defense counsel. But, given the facts of this case, it was proper.

2. Given The Facts And Circumstances Of This Case Trial Counsel Did Not Manifest A Marked Disregard For His Clients Interest In Choosing A Defense Strategy Which Included Waiving The Right To Cross-Examine Witnesses Nor Did Defendant Specifically Object To This Waiver Nor Make Such General Objection To Counsel's Conduct Of His Defense As To Be Tantamount To A Request For Dismissal.

In deliberately adopting the trial strategy of the waiver of the right to cross-exmaine witnesses and of what amounted to pretrial notification that the defense had no witnesses to testify in its own behalf, trial counsel acted in a manner quite consistent with his client's interests, given the circumstances of his case. There has been no

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Since defense counsel had already told the court (R. 21) that defense had no evidence, it is unreasonable to assume that the court meant to say, "I won't find him guilty if the evidence, which you're not going to put on, is substantial". The further statement by the court at the end of the colloquy conirms this (R. 22) as well as his conduct of the trial and his findings of fact (R. 54). Counsel who heard the statement must have understood him to mean "unless" not "if". The Supreme Court of Ohio implicitly so found (R. 81).

24a. Note, also, that when counsel moved for dismissal at the close of the state's case (R. 53), it was on the grounds that the state had failed "to sustain the *burden of proof as required in criminal cases.*" (Emphasis added.) This is further proof of his understanding of what the court intended to do.

suggestion that there were witnesses who could have testified in defendant's behalf. Defendant, himself, could not testify [or so he told his attorney (R. 55)] because he couldn't remember anything. There is no allegation that counsel could have known any facts by which to impeach the witnesses or otherwise cast doubt on their credibility. All defense counsel gave up in reality then, was the opportunity to cross-examine if anything new came up (R. 21). Perhaps by this procedure counsel hoped to lull the prosecution into making a mistake in proving all the elements of the offense. Or perhaps he hoped, as happened, that some part of the physical evidence would fail (R. 53) and that the court would not allow a continuance because of the expeditious nature of the proceedings. Counsel certainly indicated this as part of his strategy when he said: "We claim we are entitled to proceed immediately or terminate the trial at this point" (R. 50). Perhaps he hoped that the court would not allow the indictments to be amended (e.g. R. 23, 32). Whatever his particular expectation was it seems clear that his strategy was that with the overwhelming evidence against his client, his only hope was for a victory on technicalities. By proceeding in an expeditious manner this stratagem had the greatest chance for success.

Another probable consideration in the choice of this defense strategy was the hope of a mitigated penalty. Counsel probably felt that by this procedure he could make his defendant appear to be at least an approximation of the proverbial contrite and candid defendant throwing himself on the mercy of the court. True, here, the court appeared not impressed with this partial show. But better this than requiring the court to sit through the full proof expecting some show, some defense, some predication for the plea of not guilty and getting but a dumb show. The

court here could have on its verdict imposed a sentence of eight to one hundred and forty-two years (R. 15-17). It, in fact, imposed a sentence of three to sixty years (R. 15) with parole eligibility in twenty-seven months.[25]

Another possible consideration was the avoidance of civil liability, which a plea of guilty would have made certain. At the same time Petitioner's plea of not guilty did not forfeit one of the usual advantages of a plea of guilty, an advanced trial date, and thus the opportunity to begin serving the sentence early.[26]

Whatever the exact theory counsel had in mind, it is apparent counsel's choice was deliberate. He first mentioned it (R. 21) and finally approved of it (R. 22). After this final approval, Petitioner, himself, said absolutely nothing until the verdict was rendered (R. 54). This approval was neither capricious nor unwise. Even in hind-

25. Ohio Revised Code, Section 2965.31 (c); now Ohio Revised Code, Section 2967.19 (c).

26. While Petitioner had been in the county jail approximately two months (R. 22 and page 18, Petition for a Writ of Certiorari) this was well within his Ohio constitutional and statutory right to a speedy trial (Article I, Section 19, Constitution of Ohio; Sections 2945.72 and 2301.05, Revised Code; *Johnson v. State*, 42 Ohio St. 207) and any such federal constitutional right. See *Hoag v. New Jersey*, 356 U.S. 464, 472. Petitioner's present counsel suggests (Brief, page 26, note 3) that the court put improper pressure on Petitioner by telling him (R. 22) he could still have a jury trial if he wanted a full trial. When Petitioner rejected this by saying "* * * I would like to be tried by this court * * *", (R. 22) the court *in effect* asked: "tried in what manner by this court, prima facie case or complete trial?" (R. 22) This was a proper option. Moreover, although one has a right not to have a jury in Ohio, Section 2945.05, Revised Code, such section does not give an accused the *right* to have his trial advanced. There is no statutory or other guarantee in Ohio that a court sitting without a jury will hear the case sooner than one with a jury. Any advantage that a full trial before the court sans jury has over a full trial with jury, as far as advancement, is in the supposition that juries are not as available as judges. It would have little or nothing to do with the nature of the proof and the kind of preparation the prosecution must make. But it is precisely this latter factor that seemed to dictate the advancement in this case (R. 22). Since defense counsel had apparently notified the prosecution (R. 50) that it would not and could not (see above) put on a defense, the prosecution need not make as elaborate a preparation and thus could go to trial sooner.

sight it cannot be said to have been unwise. Petitioner has yet to assert a single thing cross-examination would have accomplished, had counsel chosen to proceed in that fashion. Petitioner's learned counsel before this Court suggests feebly that since eighteen months had elapsed between the date of the incidents alleged in the indictment and the date of the trial, maybe fading memories could have been trapped in a web of cross-examination.[27] The record suggests no failure in memory. Or, perhaps, evidence could have been offered. What evidence? What witnesses? From the fiber of whole cloth is spun this potential defense.

Let us make it clear, Respondent does *not* make these arguments to show that if there was error it was not prejudicial. For if there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. But Respondent does assert that when trial counsel deliberately, after ample time for preparation and consultation, chooses a method of defense (even hindsight revealing no wiser choice) then the State has a right to rely on that choice. Even if hindsight should have shown the choice to have been unwise, as long as it was the product of "good-faith representation, with all the skill counsel possesse[d]"[28] and not so transparently unwise as to make a farce of the defense, or belie the name of counselor and advocate, it would not entitle Petitioner to a second chance. *United States ex rel. Machado v. Wilkins, supra*; *United States ex rel. Reid v. Richmond, supra,* at 89. See also *Post v. Cunningham,* (4th Cir. 1965) 344 F. 2d 1; *Hester v. United States,* (10th Cir. 1962) 303 F. 2d 47 and compare *Penado v. Bailey,* (5th Cir. 1965) 340 F. 2d 162

27. Page 21 of Petitioner's Brief.
28. Hickock v. Crouse, (10th Cir. 1964) 334 F. 2d 95, 100.

and *Brubaker v. Dickson,* (9th Cir. 1962) 310 F. 2d 30, with the above.

Of course, this is really the standard for competency of counsel and counsel for Petitioner do not contend trial counsel was incompetent. Rather they contend that the right to confrontation and even the right to cross-examination were not waived because they are personal rights and can only be waived by the defendant himself, either expressly or implicitly. Respondent has shown that the overwhelming weight of authority reveals this to be a false premise.

Flowing then from the very nature of the attorney-client relationship and the purpose for the appointment of counsel (see *Powell v. Alabama, supra*), the State has a right to rely on the chosen tactics of counsel, unless such tactics are so patently fatuous as to manifest either "ineffective"[29] or incompetent counsel.

Of course, the State could not so rely if either the well consider waiver of the right to cross-examine witnesses (and advance notification that the defense would not contest the State's case with its own evidence) had been specifically repudiated by Petitioner or had Petitioner, at some point during his trial, made such general objection to the conduct of his defense by counsel as to let the court know he no longer wished such counsel to represent him.

Petitioner contends that objection is not irrelevant. Respondent agrees. Petitioner contends that there was an objection in this case. Respondent disagrees. To be an objection it must be specific. To be specific it must be such that the court is reasonably informed of what is objected to, and it must not be withdrawn. Cf. *Glasser v. United States,* 315 U.S. 60, 70. Certainly the cases cited by Peti-

29. As defined above, see notes 1, 2 and 3.

tioner[30] and Respondent, above, do not dictate a different conclusion. As Petitioner says, in those cases "* * * the court carefully pointed out that there was no objection".[31] But as to the nature of the objection that must be interposed, these courts are silent. It would seem to be implicit that any objection, in order to be an effective objection, must be such that a court could understand specifically what was objected to so that it could know how to further proceed.

In the present case even viewing the statement interjected by Petitioner in the opening colloquy (R. 21-22) most favorably to Petitioner (which the Supreme Court of Ohio would not be bound to do on collateral attack), all that can be said is that Petitioner objected specifically to the "in effect plea of guilty" aspect of the *prima facie* case and in some vague general way perhaps to the entire idea of a *prima facie* case. When the court made further inquiry, Petitioner said he wanted to be "tried by the court". When the court inquired in what manner tried by the court, counsel indicated that they wished to proceed as originally agreed, and thereafter, at no time and in no way did Petitioner voice a dissent from this agreement. At best then, any objection made by Petitioner (other than that he was not in effect admitting his guilt) was, on further inquiry by the court, withdrawn.

However, viewing this colloquy most favorably to the State (as the Supreme Court of Ohio had a right to do on collateral attack) this supposed objection by Petitioner was merely a reiteration that he was pleading not guilty and that he was not, in effect, admitting his guilt. It had no relationship to the waiver of right to cross-examine witnesses against him or the advance notification that the defense would offer no evidence in its own behalf. At no

30. Page 26 of Petitioner's brief.
31. Page 26, *Ibid.*

time does Petitioner, himself, mention the right to cross-examination or that he wants to testify or to put on his own witnesses.

It can, of course, be assumed that only if a defendant knows the law will he know whether or not to waive the right to cross-examination before the trial begins and it is certain that if he does know the theory behind cross-examination, that he could make specific objection to the loss of that right. (i.e. in some way mention questioning or examining witnesses). However, it is for the very reason that he is presumed not to know how to conduct his defense, that counsel is appointed. It is for this same reason that the decision as to whether to cross-examine witnesses or as to what evidence to offer is left to counsel. By the very nature of the attorney-client relationship, in these matters clearly within the competence of counsel and out of the competence of a layman, the acts of counsel are presumed to be the acts of the client, including the act of withdrawal of even some vague objection.

Glasser v. United States, supra, certainly does not indicate otherwise. In *Glasser* the right that was waived by counsel was the right to "effective" counsel. It was a right which involved the very nature of the attorney-client relationship. To hold otherwise, than that the client must expressly accept an altered relationship with his attorney and expressly withdraw any objection to such alteration, would be tantamount to allowing an attorney to unilaterally create the attorney-client relationship and all its incidents. In the case at bar, the waiver was a matter of defense strategy, not involving this relationship, and strictly within the usual purpose and terms of this relationship.

In short, Petitioner, either knew what was going on at his trial or he did not. If he did, then surely his one non-specific objection and continuing silence thereafter were

not adequate to inform the court of the strategy he wished to adopt. If he did not know, then he was bound by the strategy adopted by his counsel, with the limitations as set forth above. He could not have it both ways: i.e., his ignorance calling for extremely liberal construction of his vague objection and his awareness allowing him, not his counsel, to dictate trial strategy. The dissenters below would let him have it both ways (R. 87). The majority of the Supreme Court of Ohio, consistent with protecting the state's vital interest in having reasonably definitive conclusions to criminal trials, could not.

B. The Admission Of The Statement Of The Co-conspirator Into Evidence Was Not Constitutional Error Because Defense Counsel Had Completely Waived The Right To Cross-Examine The Maker Of The Statement, The Primary Reason For The "Confrontation Rule" And Moreover It Was Made Under Oath. In Addition, The Statement Had A Truth-guaranteeing Substitute For The Right To Cross-Examine In That It Was A Statement Against Interest. The Right To Have The Fact Finder See The Witness Testify, The Probable Basis Of Defense Counsel's Objection, Is Not, Without More, A Constitutional Right.

In *Douglas v. Alabama,* 380 U.S. 415, this Court stated at page 417, that "* * * an adequate opportunity for cross-examination may satisfy the clause [right to confrontation] even in the absence of physical confrontation." In the present case, the right to cross-examination was waived.

Moreover, in *Pointer v. Texas, supra,* this Court indicated that certain exceptions to the hearsay rule are also exceptions to the right to confrontation, citing *Mattox v. United States,* 156 U.S. 237. In *Mattox,* the admission of a dying declaration was deemed proper despite the objection to its admission as a violation of the right to confrontation,

because it had a truth-guaranteeing substitute for cross-examination. The out of court statement (State's Exhibit "E", R. 58-70) was a confession which put the declarant in the penitentiary. It is difficult to believe any man would make such statements from any motive other than to tell the truth. See *Donnelly v. United States*, 228 U.S. 243, 278. (Dissenting opinion by Holmes, J.) True, confessions cannot ordinarily be used against another in a criminal prosecution. See *Douglas v. Alabama, supra.* Nonetheless the fact that there was such truth-guaranteeing substitute for cross-examination, is an additional indicium of the fairness of the admission of the confession in Petitioner's trial. The fact that the statement was made under oath (R. 60), is another indication of its truthworthiness and thus of the fairness of its admission.

The probable basis of defense counsel's objection was that Petitioner had a right to have the trial court (fact finder) see the witness testify (R. 39). As both *Pointer* and *Douglas* indicate, this is not the fundamental fair trial protection underlying the Sixth Amendment or Fourteenth Amendment right to confrontation. The primary basis is the opportunity to cross-examine the witness. In *Mattox*, the court does mention that having the fact finder see the witness testify is an element of the right of confrontation but then relegates this element to secondary importance by holding that, where there is necessity and a truth guaranteeing substitute for cross-examination, the right to confrontation is satisfied.

But even less can this "right to have witnesses viewed" be said to be a part of the strictly Fourteenth Amendment right to confrontation. See concurring opinion of Mr. Justice Steward in *Pointer v. Texas, supra,* at 410. In keeping with the implicit recognition by this Court of the evolutionary development of the concept of due process, (*Link-*

letter v. Walker, 381 U.S. 618) this court should apply the right to confrontation to this case only in its Fourteenth Amendment, "fundamental fairness," aspect. Whatever the merit of *Stein v. New York,* 346 U.S. 156, *overruled on other grounds, Jackson v. Denno,* 378 U.S. 368, it did say that there was no Fourteenth Amendment right to confrontation. Petitioner's conviction became final before this was overruled. At the time of trial then Petitioner had, by the best light then available to the court, only a Fourteenth Amendment right to cross-examine witnesses. This right was waived. To promote confidence in the reliability of the decisions of this Court, Respondent submits that only this aspect of *Pointer* should be applied to this case. But, even should the Sixth Amendment right to confrontation be applied to this case, it would call for no different result.

C. The Supreme Court Of Ohio Properly Considered In Its Findings That Petitioner Had Not Been Denied A Fair Trial Because Of Prejudice On The Part Of The Trial Judge In That It Found That No Presumption Of Guilt Was Created By The Agreement To Try The Case On A Prima Facie Basis; That No Presumption Arose Or Was In The Mind Of The Trial Judge; That The Trial Judge Found Petitioner Guilty Only On Those Counts Proved By The Evidence; And The Trial Court Made Available To Petitioner All Of The Rights To Which He Was Entitled And That Petitioner Had Seen Fit Not To Avail Himself Of Certain Of Them.

1. Petitioner Has Never Raised The Question Of Judicial Prejudice Until It Appears In the Brief Filed Herein.

A thorough examination of the proceedings in the Ohio Supreme Court and in his petition for certiorari filed herein fails to disclose a contention by Petitioner of prejudice on the part of the trial judge. The Ohio Supreme Court,

however, did consider this question in deciding the case below.

Respondent considers that the applicable rules of this Court, with respect to considerations governing review on certiorari in the case herein, are Rules 19, 1 (a); 23 (c) and 40, 1 (d) (2).

Rule 19, 1 (a)[32] provides in part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The questions presented to and decided by the Ohio Supreme Court were: (1) that he [Petitioner] had not been indicted upon the charges for which he was ultimately tried and that he had been denied adequate notice of the charges upon which he was tried; (2) that he had been denied his constitutional right of confrontation by reason of the introduction by the State of an alleged confession of a co-defendant; and (3) that he had been denied the right to cross-examine witnesses who testified against him (R. 72). He did not raise the question of judicial bias or prejudice which was however considered by the Court.

These were the only questions decided by the Ohio Supreme Court. In a dissenting opinion the question of a speedy public trial also was considered. It is Respondent's position that the dissent based this opinion on the statement, "I won't find him guilty if the evidence is substantial" (R. 86). Respondent submits that this statement taken

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32. U.S. Sup. Ct. Rule 19, 28 U.S.C.

out of context might support such a contention on the part of the dissenting judges. It is Respondent's position, however, that the court meant to say, "I won't find him guilty unless the evidence is substantial", which is borne out by the court's subsequent statement that *there is no question but that the court will require this* [that the State of Ohio prove each and every material allegation necessary on all counts] (R.22).[33] The dissent definitely based its contention with regard to speedy trial on an erroneous factual situation, namely that it believed the Petitioner to have been incarcerated in the county jail for the past eighteen months rather than two months, as was the fact (R. 87).

Rule 23 provides in pertinent part to the question here raised:

> "1. The petition for writ of certiorari shall contain in the order here indicated——
>
> "(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.
>
> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (eg., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the

33. See note 24, *supra.*
34. U.S. Sup. Ct. Rule 23, 28 U.S.C.

federal question was timely and properly raised as to give this court jurisdiction to review the judgme on writ of certiorari.

"3. All contentions in support of a petition for w of certorari shall be set forth in the body of the petiti as provided in subparagraph (h) of paragraph 1 this rule. * * *"

A careful reading of petition filed herein fails to d close the contention of prejudice on the part of the tr court.

Rule 40[35] provides in pertinent part to the questi here raised:

"1. Briefs of an appellant or petitioner on the mer shall be printed as prescribed in Rule 39, and sh contain in the order here indicated——

"(d) (2) The phrasing of the questions present need not be identical with that set forth in the jurisd tional statement or the petition for certiorari, but t brief may not raise additional questions or change t substance of the questions already presented in th documents. Questions not presented according to t paragraph will be disregarded, save as the court, its option, may notice a plain error not presented."

The question of judicial prejudice was raised for t first time in Petitioner's brief filed herein.[36] It remai therefore, whether the question of judicial prejudice c stituted a "plain" error affecting the substantial rig of Petitioner within the meaning of R. 52 (b).[37]

2. The Acts and Words Of The Trial Judge, Viewi The Record As A Whole, Manifest That He Used Constitutional *Standard of Guilt.*

35. U.S. Sup. Ct. Rule 40, 28 U.S.C.
36. Page 3 of Petitioner's brief.
37. Rule 52 (b), Federal Rules of Criminal Procedures, 28 U.S.C.

Respondent considers that the trial itself was preceded by a colloquy by the court and counsel, during which it was determined how and under what conditions the trial was to proceed. The trial itself was divided into two sections, first the introduction of proof and secondly the findings of the court. The trial was followed by the imposition of sentence.

During the pretrial phase, counsel for Petitioner raised the question of *Prima facie* case for the first time as follows: "The only thing is, Your Honor, this matter is before the court on a prima facie case" (R. 21). This has every implication that Petitioner and his counsel had had prior discussions of this procedure and had determined that they would proceed in this manner; also that the procedure had been discussed with and acceded to by the prosecution. This is supported by the statement of Petitioner in his petition herein wherein he acknowledged certain waivers specifically made by him and further acknowledged that others had been made by his court appointed attorney, in whom he had trust.[38]

The court then indicated the understanding of a *prima facie* case to be one wherein there was to be no cross-examination of witnesses and likened it to be one where the defendant, *not technically or legally,* in effect admits his guilt and wants the State to prove it. A misunderstanding of the right to cross-examine was cleared up at this time (R. 21). All of this discussion took place in the presence and hearing of Petitioner, who interjected, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). The court's reaction to this statement certainly was not one of prejudice. He advised the Petitioner who already had waived, in writing, a jury trial that, "If you want to stand trial we will give you a jury trial". Petitioner

38. Page 5, Petition for Writ of Certiorari.

then indicated that *he wanted to be tried by this cou* (R. 22).

It is here interposed that to answer the argument Petitioner's brief going to all matters concerning judici prejudice with respect to prejudgment of the case, a evidence thereof had accrued at this time; in spite of th Petitioner himself insisted on being *tried by this cou* Whether he subsequently was tried by a *prima facie* ca or a complete trial, the prejudice now inferred from t cold record by Petitioner's counsel and the dissenting opi ion below certainly was not then felt to be present either Petitioner or his trial counsel, nor did the majority of t Supreme Court of Ohio so find, even from the cold reco The court then told him, "Make up your mind whether y require a prima facie case or *a complete trial of it*" (R. 2 (Emphasis supplied). That Petitioner regarded this as offer to him of either type of trial is set forth in his pe tion for certiorari.[39] It should be noted that under Oh law, one who waives jury trial has a right to be tried by t court alone.[40] This section has been held to be mandato and the court cannot reject accused's election to waive ju trial. *State v. Smith,* 123 Ohio St. 237, 174 N.E. 768.

Respondent contends, therefore, the court at this poi offered Petitioner an alternative of a *prima facie* case or or a full trial before the court. At this juncture Petitione counsel indicated, "Prima facie, Your Honor, is all th we are interested in" (R. 22).[41]

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39. Page 7, Petition for Writ of Certiorari.

40. Ohio Revised Code, Section 2945.05 (1953).

41. To understand the reason why a *prima facie* case was sou by Petitioner's trial counsel, it is necessary to consider Ohio statut law with respect to pleas, which is set forth in Section 2943.03, O Revised Code. With respect to general pleas allowed therein only plea of guilty and not guilty are provided. There is no statutory p of nolo contendere in Ohio in felony cases, therefore, when one charged with a crime which he knows that he cannot successfully defe but a plea of guilty will subject him to a penalty in a civil

Before the trial started, therefore, Petitioner's attorney had agreed that the case was to be tried on a *prima facie* basis and that there would be no cross-examination of witnesses. This also was well known to Petitioner, who appeared to understand fully all that was taking place before him. The court had discussed the matter of no cross-examination of witnesses before it did the implication of the *Prima facie* case with respect to its effect, yet when Petitioner interjected that he was in no way pleading guilty, he did not object to the provision that no cross-examination would be allowed, nor did he complain that he had not been allowed to cross-examine at any time prior to sentence.

Petitioner's present contention that the pretrial colloquy amounted to a prejudgment of the case, therefore, is not justified. In effect, it amounted to no more than a pretrial conference held by the court and the opposing counsel to determine on what theory each side intended to base its case, the evidence that it intended to produce to support it and the number of witnesses that might be called to prove it in order that the court might be prepared to rule on any legal questions that might arise and to ascertain how long the trial might last.

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arising out of the same factual situation, he is without recourse to a plea of nolo contendere as is permitted in federal courts and certain other state courts. To circumvent this difficulty some Ohio courts have allowed, as was done here, the accused to enter a plea of not guilty and by arrangement require the prosecution to prove only a *prima facie* case. In such proceedings in Stark County, Ohio, the procedure was to require the State to prove only a prima facie case without the right by the defense to cross-examine witnesses and to present proof. In this case when defense counsel interviewed Petitioner, Petitioner was unable to afford him anything upon which he could base a defense. This is substantiated by the record wherein defense counsel, in a statement made in mitigation of sentence, said,

"* * * I might say to the court also, at the time of this occurence in October of 1960 the defendant was taking benzedrine, he was drinking heavily, he actually has right along, he has had no recollection of these events there and by virtue of his hospitalization in a federal hospital he has helped himself and was hoping he could continue as such." (R. 55)

The statement made several times in his brief that the court stated at the outset that Petitioner had admitted his guilt, just is not borne out by the record.

The record itself shows that Petitioner has denied only one of the crimes charged. When questioned by a deputy sheriff of Stark County, he denied any part of the breaking and entering of the Beacon Box Co. But he did not, at any time, deny the forgery or the uttering of the checks (R. 44). It is not unreasonable, therefore, to assume that before the trial began, the trier of facts had some knowledge of the case because without its concurrence such a procedure could not have been adopted (R. 80). In fact, it would be ridiculous for counsel for respondent to intimate to this court that trial court did not have some prior knowledge of the case with respect to the quantity and quality of the evidence available to the State, particularly when at least one of Petitioner's co-defendants, who apparently did remember the facts and circumstances surrounding the charged offenses, had pleaded guilty thereto in his court (R. 31).

The trial itself presented quite a different picture. At the outset of the trial the prosecutor said that, "The State of Ohio will prove each and every material allegation necessary [to prove the charges] in those particular cases by witnesses", to which the court replied, "There is no question the court will require that" (R. 22).

Aside from allowing the amendments to the indictments over defense counsel's objections heretofore set forth and the allowance of the checks supporting them in evidence, the record shows, that with the exception of one going to the admission of a sworn statement of a co-defendant, the court sustained every material objection made by the defense. In fact, the court even called to the attention of defense counsel an objectionable question going to the hear-

say establishment of the value of the alleged stolen property (R. 51). It did not allow in evidence State's Exhibit "F" even after defense counsel had indicated that he had seen it and had no objection to its admission (R. 49—50). The court further refused the State a continuance to allow the procuring of proof on the seventh and eighth counts of the forgery and uttering indictment and sustained the objection of defense counsel to the admission of State's Exhibit "D", upon which they were based.

Viewed as a whole, the trial phase of the proceedings failed to disclose any denial of fairness to Petitioner. This Court has held that the test of the denial of due process is that,

> "As applied to a criminal trial [in a State court] denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of due process we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisemba v. California,* 314 U.S. 219, 236.

Federal courts have held that in making an appropriate application of such a test [in reviewing a State case in a habeas corpus action] an United States court will refuse to grant habeas corpus if it is satisfied from the record, as a whole, that the state court gave fair consideration to the issues, reached a satisfactory result, and protected the rights of the Petitioner under the Constitution of the United States. *Ramsey v. Hand,* (10th Cir. 1962) 309 F. 2d 947.

Under the federal Constitution's guarantee of due process, "[a] person accused of committing a crime is vouchsafed basic minimal rights; among these are the right to counsel, the right to plead not guilty and the right to be tried in a court room presided over by a judge". *Rideau v. Louisiana,* 373 U.S. 723, 726. In *Rideau* the court found

from the facts that Defendant had been tried several tim
by the public, via television wherein he had admitted t
crime, before he ever got into court and that members
the jury had seen the television programs; such is not t
case here. The Court also, citing *Brown v. Mississip*
279 U.S. 278, said that the state is free to regulate the pr
cedure of its courts in accordance with its own conceptio
of policy, but it does not follow that it may substitute tri
by ordeal. It hardly can be said that the procedure agre
upon by the court and defense herein falls in this categor

Certainly the trial judge herein was in no more a bias
position than a juror who contended that he could try
case fairly and impartially and render a verdict on the la
upon evidence even though he had formed some preco
ceived opinions based upon newspaper publicity. He havi
been allowed to sit, this Court held that such did not co
stitute a violation of Defendant's constitutional rights.
The Matter of August Spies et al, 123 U.S. 131.

And again this Court found that it was not prejudici
error where a juror who, although he had knowledge of t
case gleaned from the newspapers, and had indicated th
it would take some evidence to remove it stated that if t
evidence failed to prove the facts alleged in the newspaper
he would decide according to the evidence or lack of eviden
at the trial, and that he thought that he could try the ca
solely upon the evidence fairly and impartially. Mr. Justi
Holmes said, "The finding of the trial court upon t
strength of the juryman's opinions and his partiality
impartiality ought not to be set aside by a reversing cou
unless the error is manifest, which is far from being t
case [here]". *Holt v. United States,* 218 U.S. 245, 24
Herein, the court said that there was no question that t
State would have to prove each count charged.

Respondent takes the position that the burden of proving that the court herein was prejudiced is on the Petitioner. This Court has so held with respect to a juror; and in the case herein the court was fulfilling the jury function in deciding guilt or innocence. In *Reynolds v. United States*, 98 U.S. 145; 25 L. Ed. 244, 247, this Court held:

> "The affirmative of the issue [of prejudice] is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror will not necessarily be set aside, and it will not be the error of the court to refuse to do so."

And this Court has held unanimously, as recently as 1960, that:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside an impression or opinion and render a verdict on the evidence presented at court." *Irvin v. Dowd*, 366 U.S. 717, 723. and "As stated in Reynolds the test is 'whether the nature and strength of the opinion formed are such as in the law necessarily * * * raised the presumption of partiality. The question presented is one of mixed law and fact * * *' at P. 156. 'the affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * * if a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' at P. 157." *Irvin v. Dowd, supra*, 723.

The court below found that the agreement entered into prior to the trial did not create a presumption of guilt nor that the trial court so considered it as follows:

> "* * * No presumption of guilt was created by such agreement. The state was required to prove all the essential elements of the offense. The court, from this evidence, then determined the guilt of the accused. That no presumption arose or was in the mind of the court is clearly exemplified by the fact that the court found petitioner not guilty on two of the counts with which he was charged. (R 81).

3. The Trial Court Made No Improper Inference Of Guilt Under The Law As It Obtained At The Time Of The Trial.

In making its finding the court did so as follows:

> THE COURT: As to count one, the testimony clearly shows beyond a reasonable doubt the defendant is guilty of count one, and also of count two, uttering and publishing, that check. Count Three, the count based on Ex. 'B', there isn't any question about the guilt of the defendant on that one, or on count four, the forgery of that check. The testimony is clear that all these checks were forged with defendant's knowledge and his presence at the time of the passing; the passing the court finds was done, some of them, by the defendant himself, and some by his co-defendant, a co-conspirator.
>
> "The Court finds the defendant guilty of . . . as charged in the indictment of #18139, except as to the 7th and 8th counts.
>
> "[fol. 64] Now coming to the indictment #18101 charging breaking and entering and grand larceny, there isn't any question there was a breaking and entering and the testimony of the co-conspirator Robert Mitchell, there isn't any question about his testimony which definitely makes the defendant present at the crime and guilty of that count. And as to all the evidence in this case the court finds the defendant is guilty of the second count of grand larceny. Besides this, in going to the question of guilt, of course, the

court states on matters of law the statute allows such as flight, failure of the defendant to take the stand in his own defense, and all other matters that are legally competent to be considered." (R—54)

The court found at the outset that on testimony introduced by the State, it clearly showed *beyond a reasonable doubt* that the defendant was guilty of counts one through six of the forgery and uttering indictment. With respect to the breaking and entering of grand larceny charges the court found that there was evidence to prove breaking and entering without question and the testimony of the co-conspirator, Robert Mitchell, [sworn statement of Robert Mitchell] unquestionably placed the Petitioner at the scene of the crime. This enabled the court to find Petitioner guilty of the breaking and entering and larceny indictment. The court then alluded to matters of law that he was allowed to consider such as flight, failure of Petitioner to take the stand and all other matters that are *legally competent* to be considered.

There is no inference that can be drawn from this statement other than the fact that the court was being scrupulously careful not to consider anything with respect to Petitioner's guilt other than those things which by law he could consider.

Petitioner admits that under the decision of *Tehan v. United States ex rel. Shott*, 52, U.S., January 19, 1966 the no-comment rule of *Griffin v. California*, 380 U.S. 609, was not applicable to this case. The subsequent argument that the court made unreasonable and unfair inferences of guilt in spite of *Tehan* are not supported by the cases cited. Both *Stewart v. United States*, 366 U.S. 1 and *Grunewald v. United States*, 353 U.S. 391, where cases involving trials in federal courts wherein the rule against self incrimination has long been protected under the Fifth Amendment to the

Constitution of the United States. With respect to State Proceedings, however, this restriction was not applicable until the decision of this court in *Malloy v. Hogan,* 378 U.S. 1, decided June 15, 1964, and until *Griffin v. California,* 380 U.S. 609 was decided it was not applicable with respect to adverse comments by the prosecutor or trial judge. Until then the states could rely upon the decision in *Twining v. New Jersey,* 211 U.S. 78 (1908), which held in a case wherein, after trial, the judge instructed the jury that it might draw an adverse inference from defendant's failure to testify, the court held explicitly and unambiguously, "That the exemption from compulsory self-incrimination in the courts of the state is not secured by any part of the federal constitution." *Twining v. New Jersey, supra,* at page 114. This rule has been followed consistently since then until *Malloy,* Cf; *Snyder v. Massachusetts,* supra, 105; *Brown v. Mississippi,* 297 U.S. 278, 285; *Adamson v. California,* 332 U.S. 46; *Cohen v. Hurley,* 336 U.S. 117, 127–129. Under this doctrine the trial judge herein had every legal right to consider the failure of Petitioner to take the stand under Article I, Section 10 of the Constitution of Ohio, which provides in part as follows: "* * * No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel * * *."

Petitioner further argues that herein there was an explanation for silence which not only was consistent with innocence, but left no room for an inference of guilt. This statement [that Petitioner was a victim of alcoholic amnesia] was made after the finding of guilty by way of mitigation. Had the statement been made by defense counsel prior to verdict, it still would not have raised an

inference of innocence under the facts of this case. Cf. *Babb v. United States,* (8th Cir. 1955) 351 F. 2d 863.

At the conclusion of a jury trial the trial court is required by law to charge the jury with respect to the presumption of innocence of the defendant and the burden of proof that is necessary to overcome the presumption. The court further must review the evidence to indicate what may or may not be considered by them in reaching a verdict. In a trial before the court without a jury the same consideration must be made by the court. There is nothing in the record to show that the judge did not follow such a mental procedure in this case; to the contrary the record supports the conclusion that it did so (R. 54).

Respondent contends that whereas a jury may be so prejudiced by many things that are presented to them during the course of a trial, that instructions that they must be disregarded are ineffectual, a trial court is well aware of his responsibilities with respect to all aspects of what constitutes a fair trial and will scruplously adhere to them. It is submitted that the trial court did so in this case. No defendant is insured that some error will not be made by the trial judge in ruling on objections or that his counsel will not overlook some objections that should be made. In short, he is not guaranteed a perfect trial, only a fair one. *Lutwak v. United States,* 344 U.S. 604, 619; *Fallen v. United States,* 343 F. 2d 844.

The court below found that Petitioner was afforded a fair trial and this finding is supported by the record.

And other cases cited by Petitioner in his brief hardly support the factual situation with which we are faced herein. At the outset Respondent agrees and further submits that Petitioner had a right to a fair hearing before an impartial judge. Counsel for Respondent having, as a defense counsel in Michigan, been a victim of such a pro-

cedure as was set forth in Murchison, agrees that when
judge had sat as a one man grand jury and then trie
witnesses appearing before the grand jury for contempt
it hardly can be said that the judge was unbiased. *In r*
Murchison, 349 U.S. 133.

And Respondent agrees that a mayor who depended upo
fines as his sole source of costs would likely stretch the fact
in favor of the State of an accused. *Tumey v. Ohio* 273 U.S
510. *State ex rel. Pratt v. Weygandt,* 164 Ohio St. 463; 13
N.E. 2d 191 is hardly applicable herein. That case deal
with the mandamus action to the Ohio Supreme Court t
remove a judge from hearing the case because of prejudice
Herein the Petitioner insisted on being *tried by the Cour*
It is acknowledged, however, that at page 469, the Suprem
Court did formulate a definition of the term "biased o
prejudiced" and it submitted that this is the criteria tha
the court applied in deciding the case herein.

In the face of Petitioner's insistence that he be tried b
the court and in so doing must have believed that the cou
would render an unbiased opinion, the facts in *Juelic*
hardly apply. There the court held "We have not yet foun
any decision, and we have been cited to none, wherein
defendant has been held to have had a fair trial afte
conviction by jury of twelve men, every member of whic
had sworn on voir dire that he had an opinion the defenda
was guilty." *Juelich v. United States,* (5th Cir. 1945) 214 F
2d 950, 955.

In *Irvin v. Dowd, supra,* and *Rideau v. Louisana, supr*
various types of widely circulated publicity had shown an
published confessions of the crimes charged and jurors wh
had read and seen the articles and programs, were allowe
to sit. Here Petitioner never, at any time, admitted hi
guilt before, during, or after trial.

With respect to the trial itself there were no instances where, as in *Maestas v. United States,* 341 F. 2d 493, a mistrial was denied because of improper examination of a prosecution witness which was repeated after an admonition to the prosecutor by the court; nor as in *Lane v. Warden,* 320 F. 2d 179 where evidence of defendant's criminal record was allowed to be presented to the jury at the outset of the trial and a motion for a mistrial was made and denied; nor as in *Rogers v. United States,* 304 F. 2d 520, wherein defendant was on trial for counterfeiting and, after eleven jurors had been accepted, a prospective twelfth juror on voir dire examination, and in the presence of the other eleven, said that as a director of a bank he had received some of defendant's money [counterfeit] three years before, after which a motion to discharge the jury was overruled; nor as in the case of *McFadden v. United* 63 F. 2d 11, where, after the court had refused to grant a severance before trial, sworn a jury and then allowed one co-defendant to plead guilty and subsequently refused to discharge the jury on motion of the remaining defendant.

Petitioner who insisted upon *being tried by this court* hardly can now say that *this court* was prejudiced because he knew that the co-defendants had formerly theretofore pleaded guilty or that he had served a prior sentence when it was agreeable to his counsel to allow a letter written by Petitioner from a penal institution in the evidence.

4. The Trial Judge Violated No Constitutional Right Of Petitioner During The Sentencing Phase Of This Case.

Prior to the adjudication of the sentence defense counsel requested to be heard ostensibly for the purpose of mitigation. He related that Petitioner had spent a considerable period of time in a federal institution under a federal sentence and that he had asked to be returned to stand trial

in Ohio. Counsel further stated that at the time the offense of which Petitioner stood convicted, took place, he wa drinking heavily and taking benzedrine and had no recollec tion of the events constituting the offenses charged. It i hardly likely that such a presentation would persuade th court under the facts presented in this case. While it i conceivable that a person under the influence of alcoho might not remember certain events that took place ove a considerable period of time [it is conceded by Respondent for instance, that Petitioner might not have remembere the burglary of the Beacon Box, Inc.] it is entirely incon ceivable that three different business people would cas a check for a person who was so intoxicated that he coul not remember the occasions.

The court had a right to wonder why he had elected t stand trial, yet failed to take the stand to explain this lac of memory and it used the words it did, however unfortun ate, to express its disbelief in Petitioner's explanation There is nothing in the record to indicate that the cour was hostile, harsh, or abusive in manner nor that it con demned Petitioner for pleading not guilty, only that i believed that Petitioner was taking a flier which, perhaps would be of some advantage to him.

The only excoriation that took place is in the mind o counsel. Now, and for the first time, the court considere a letter offered in evidence as Exhibit "F" which he ha refused to allow even though defense counsel had indicate that he had no objection [at R. 49]. He even indicated tha he had not used this information in his finding of guil on the merits when he said, "I can speak of it now" (R. 56).

And certainly Petitioner had no reason to expect a acquittal. He had been confronted by numerous State wit nesses, all of whom told a straightforward story and all bu

one of whom had a responsible position in the community; a sworn statement of a co-defendant was presented in evidence; and Petitioner presented no evidence of any kind in his defense. A failure to present evidence by way of mitigation in a *prima facie* case certainly is not consistent with the plea of not guilty.

Petitioner now contends that the manner in which the trial court reacted to defense counsel's mitigating statement was a basis for the imposition of an exceedingly heavy sentence. There is nothing in the record to support this contention, or that the court was giving Petitioner a heavier sentence than his co-defendants because he had pleaded not guilty as was done in *United States v. Wiley,* (7th Cir. 1960) 278 F. 2d 500; nor that he was given an unusually heavy sentence [where as in Illinois it is discretionary for the court to set the sentence] because he had pleaded not guilty. *People v. Moriarty,* 25 Ill. 2d 565, 185 N.E. 668. The fact is that herein the court made three of the sentences run consecutively, which in effect, extended the time for which Petitioner would be eligible for parole from ten months, as would have been the case if all sentences were to have run concurrently to twenty-seven months; the sentences on all other counts ran concurrently with the above. In the aggregate the sentence imposed was from three to sixty years. It would have been from eight to one hundred forty-two years, had the court made all sentences run consecutively which it had the right to do.

CONCLUSION

Respondent acknowledges that Petitioner was entitled to a fair trial; but it contends that the State also was entitled to a fair trial. Had Petitioner at the pre-trial colloquy, after his counsel had agreed to a *prima facie* case, the terms of which had been established clearly and fully, indicated by

act or deed that he did not agree with his counsel's strateg the prosecution then could have elected to present a com plete case and afford Petitioner the opportunity to challeng it. And had the trial court not considered that Petitione was in full accord with the procedure agreed upon, ther is little doubt that he would have insisted that Petitione avail himself of a complete trial. This is supported b Petitioner's own statement in his petition.

Petitioner should not now be allowed to come before thi Court and maintain that he had been deprived of his righ to "take the State by surpirse" or to "fool the State' because his counsel waived this right without his consent.

As Chief Judge Lumbard, speaking for the Secon United States Circuit Court of Appeals appropriately saic **"Every defendant must, of course, be accorded a fair tria But the state is also entitled to a fair trial. When, afte an extended hearing, informed and experienced defens counsel has taken a position, and the state, in reliance o it, has tried its case accordingly, it would be unduly tippin the scales of justice against the state to permit a defendar to argue that his conviction must be vacated because hi counsel should not have taken the position he did an should not have made the concession on which the stat acted."** *United States v. Richmond, supra,* at page 89.

Respondent respectfully urges this Court to affirm the de cision rendered by the Supreme Court of Ohio.

Respectfully submitted,

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